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# Lorraine Jane Wilcke v. Leonard theodore Wilcken : Brief of Respondent

Utah Supreme Court

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RICHARD B. JOHNSON; Attorneys for Appellant;

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IN THE SUPREME COURT OF THE STATE OF UTAH

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LORRAINE JANE WILCKEN,	)	
Plaintiff-Appellant,	)	
vs.	)	CASE NO. 16,772
LEONARD THEODORE WILCKEN,	)	
Defendant-Respondent.	)	

---

REPLY BRIEF OF RESPONDENT

---

REPLY TO AN APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL  
DISTRICT COURT IN AND FOR DUCHESNE COUNTY, STATE OF UTAH,  
The Honorable George E. Ballif, Judge

---

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Defendant-Respondent. )

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BRIEF OF RESPONDENT

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NATURE OF THE CASE

Respondent concurs with appellant's statement of the Nature of the case and of the Disposition in the lower court.

RELIEF SOUGHT ON APPEAL

Respondent seeks the affirmance of the judgment of the lower court and for an award of the interest he has lost on his portion of the marital assets by reason of this appeal.

STATEMENT OF FACTS

The appellant and respondent were married on November 22, 1972, in Salt Lake City, Utah. There were no children born as issue of the marriage (R. 1, 26). The appellant is in her late fifties and the respondent is in his early sixties (R. 209). The respondent is employed by the Utah Department of Transportation and the appellant is self employed.

The trial court found that the respondent made a gross contribution of \$64,442.50 to the combined assets of the marriage (R. 132). This amount was debited by \$2,700.00 by reason of the return to respondent of certain property contributed by the

respondent to the marital assets, for a net contribution of \$61,722.50 (R. 135). The court found the appellant gross contribution was \$23,000.00 to the combined assets of the marriage. Appellant's contribution was debited by \$10,000.00 by reason of appellant's gift to her daughter by a previous marriage from joint funds of the parties, for a net contribution of \$13,000.00. (R. 135)

The court found that while both parties had made contributions to the marriage:

"all of the contributions by the parties should be deemed to have gone to the joint support and maintenance of both of them, and are not recoverable by either party and that the same should include such matters as the respondents wages, retirement contributions and any claims by appellant to have contributed additional sums from her savings account, bank account, wages, etc. (R. 135,136).

Neither of the parties were to recover anything by reason of the same." (R. 138).

The parties acquired various pieces of real property during their marriage which are set out in the Second Amended Findings of Fact and Conclusions of Law (P. 131-44). Respondent had contracted to purchase one parcel of ground, identified hereafter as the "Independence property", and had paid 70% of the purchase price, prior to the marriage. This piece of property was sold during the marriage. The court divided the profit realized from said sale, 70% to respondent and 30% to the marriage. The trial court in dividing the assets of the parties held:

"From the proceeds of the sale of the real and personal property of the parties, each party should first be reimbursed for the pre-marital property each contributed to the marriage. The remaining assets. . . should be divided equally between the parties." (R. 135).

Each of the parties were also to be debited for any of the marital or personal property they claimed for their own.

The appellant disputes the trial courts method of distribution of the equity in the real property located in Independence and the court's findings as to what were the net assets that each party contributed towards the marriage.

#### POINT I

THE COURT DID NOT ABUSE ITS DISCRETION  
DIVIDING THE REAL PROPERTY OF THE PARTIES.

Under Utah law, a trial judge is afforded considerable latitude of discretion in the disposition of property involved in a divorce proceeding and his judgment should not be changed unless it works such a manifest injustice or inequity as to indicate a clear abuse of discretion. Pearson v. Pearson, 561 P.2d 1080 (Utah, 1977).

A party seeking a reversal of the trial court must prove that the court either misunderstood or misapplied the law, resulting in substantial and prejudicial error; or, that the evidence clearly preponderated against the findings; or, that such a serious inequity resulted from the order as to constitute an abuse of discretion. (It is not the role of the appellate forum in such cases to evaluate the sagacity of the trial court's decision, inasmuch as that decision is based on shadings of fact and circumstances unavailable to the reviewing court). McCrary v. McCrary, 599 P.2d 1248 (Utah, 1979).

The appellant does not challenge the fairness of the trial



court's over-all decision governing the division of the partys' joint property. Rather, appellant challenges only the fairness of the division of the profits from the sale of the Independence Property.

The appellant's dissatisfaction with the division arises because she was granted a percentage of the profits proportional to the amount which was contributed toward the original purchase price after the marriage occurred rather than receiving an equal share of the entire sale profits. (As indicated in the statement of facts, the Independence property was acquired by the respondent before the marriage. Respondent had paid 70% on the purchase price from his funds, prior to the marriage of the parties.)

Appellant's claim to a greater share of the proceeds is based on three (3) supposed errors committed by the court: first, the appellant contends that she is entitled to an equal, not a proportional share of all equity developed during the marriage; secondly, respondent, after receiving a return of the payments he had made on the property prior to the marriage, should not be allowed to receive 70% of the remaining profits; thirdly, respondent's pre-marital assets should not have been credited with his pre-marital payments on the Independence property as this further reduced appellant's award. Though this property was acquired by respondent prior to the marriage, appellant argues that the profits should be divided in the same manner as the joint property acquired during the marriage. Appellant contends, that only her method and not the trial

court's, will produce an equitable division of the profits.

Appellant's arguments do not raise any questions of the trial court's misapplication or misunderstanding of law, nor does appellant suggest any evidence which preponderates against the decision. Rather, appellant attempts to challenge the trial court's sagacity in the exercise of its broad discretionary powers to decide such matters, by asserting that appellant's method is best.

The trial court has the duty to consider various factors relating to the situation and to arrange the best possible allocation of property and economic resources of the parties so that the parties . . . "can pursue their lives in as happy and useful a manner as possible." Read v. Read., 594 P.2d 871 (Utah, 1979). The record reveals that the trial court considered three (3) major factors urged by respondent when deciding the distribution and allocation of the equity in the Independence property: first, the Independence property was acquired by respondent prior to the marriage (R. 132, paragraph 2, 301); secondly, appellant and respondent jointly contributed only thirty percent (30%) toward the purchase price. (R. 133, paragraph 5a); and third, appellant was not required to make an accounting of the property which she had acquired prior to the marriage, consisting of two (2) homes, one in Utah and the other in Wisconsin, etc. (R. 133, paragraph 3).

Further, appellant neither provides nor attempts to provide a showing that the trial court's decision relating to this piece of property would either prevent the appellant from pursuing her

life in as happy and useful manner as possible, or that the decree was so discordant that it would lead to difficulties and distress to the appellant. Read supra, at pg. 872.

It is clearly respondent who would suffer an injustice if the appellant were allowed to share equally in the profits of the Independence property while contributing only a minor portion towards its purchase, and at the same time, not having to account for properties acquired by appellant prior to the marriage. Respondent asserts that when the trial court's decision is viewed in light of the facts, the decision clearly did not produce a serious inequity as to amount to an abuse of discretion, etc. Since it does not appear that the trial court was acting outside its discretion when it awarded the parties profits from the sale of the Independence property in proportion to their marital and pre-marital contribution towards its purchase, the decision should be left undisturbed.

Respondent again points to the fact that appellant does not dispute the fairness and equity of the ultimate judgment dividing the joint property. The appellant protests only the decision involving the equity in the Independence property. In Pearson, op. cit., the Supreme Court of Utah, felt it was significant that though the appellant was dissatisfied with the division of the property, that appellant had made no claim that the ultimate decision was unjust. Further, since appellant contests the court's division of property, then appellant has the burden of proving that the Findings of Fact did not sufficiently support the decree. Findings of Fact are deemed sufficient if they

ascertain ultimate facts and sufficiently conform to the pleadings and the evidence to support the judgment. (See Rule 52, U.R.C.P.)

Appellant's arguments in no way demonstrate that the trial court's Findings of Fact are not sufficiently supported by the evidence, or that the court's decision could not be supported by the Findings of Fact. Appellant's arguments relate solely to appellant's opinion of an alleged inequity in the division of the equity in the Independence property. Where appellant has not shown that: the Findings of Fact do not sufficiently support the ultimate decision; or, shown where the court has misunderstood or misapplied the law; or, cannot demonstrate any distress to the appellant from the ultimate decision; then the appellant has failed to bear its burden of showing an abuse of discretion. See McCrary, Pearson and Read, op. cit.

## POINT II

THE COURT DID NOT ABUSE ITS DISCRETION IN NOT DEDUCTING RESPONDENT'S ALLEGED PRE-MARITAL INDEBTEDNESS FROM HIS PRE-MARITAL ASSETS.

As stated above, a trial court while granting a decree of divorce is afforded considerable discretion in the area of property distribution. In these matters a party seeking a reversal, must prove a misunderstanding or misapplication of law resulting in substantial and prejudicial error, or that the evidence clearly preponderates against the findings or that such a serious inequity resulted from the order as to constitute an abuse of the trial courts discretion. McCrary, op. cit. Further,

the trial court's decision is to be indulged with a presumption of validity. Mitchell v. Mitchell, 527 P.2d 1359 (Utah, 1974).

The burden is therefore placed upon the appellant to show by the facts that: the evidence clearly preponderates against the decision; the court either misunderstood the law, or misapplied it; or the court's decision was grossly inequitable. Mere assertions of amazement such as those made by appellant towards the court's methods are not sufficient.

The appellant offers no facts showing why the court's method was either error, prejudicial or inequitable. The only facts presented merely show that the court did not make the deductions.

Without such a showing the appellant has not met her burden of showing an abuse of discretion.

In support of the trial court's decision the respondent again submits these facts that were considered by the trial court.

1. The great majority of the respondent's pre-marital indebtedness was for a mobile home which the respondent had purchased for the parties to live in. The respondent did not count the mobile home as an asset which he contributed to the marriage because of that debt. It was a "wash" transaction, i.e., value and indebtedness being equal. (R. 103)

2. A large portion of the remaining debt was for the unpaid balance due on respondents GMC truck, which truck was used in the ranching operations from which the appellant derived benefits. (R. 103)

3. None of the appellant's pre-marital indebtedness was considered as a reduction against her pre-marital assets, nor was there a reduction of her pre-marital assets by reason of the reduction of that indebtedness that was made during the marriage. (R. 102, 133)

Therefore, in view of these facts which support the trial court's decision, and, appellant's failure to provide evidence



showing an abuse of discretion by the trial court, respondent submits that the appellant's claim of error is without merit.

### POINT III

#### THE TRIAL COURT DID NOT ERROR IN REFUSING THE PLAINTIFF'S MOTION FOR A NEW TRIAL.

The appellant quotes Rule 59(a) URCP as support for a new trial:

[a] a new trial may be granted to all or any of the parties in and on all or part of the issues for any of the following causes . . . (4) newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at trial. (emphasis added)

Appellant contends that she produced evidence consisting of tax returns and sales receipts, at a post trial motion, which tested the respondent's credulity, and in light of that new evidence a new trial should be granted.

Rule 59 is a discretionary rule, which specifically requires that the evidence be new evidence, which could not, with the use of reasonable diligence, have been available for trial. The court's refusal to grant a new trial was not error where the allegedly newly discovered evidence was in appellant's possession at all time and was reasonably a proper subject of discovery, which could have been obtained by the exercise of due diligence. See Powers v. Gene's Bldg. Materials, Inc., 567 P.2d 174, (Utah, 1977). Additionally, regarding any new evidence, we must consider the governing principals long held by this court that the "newly" discovered evidence

must appear, . . . (2) not simply cumulative; (3) that such evidence is not sufficient if it simply be to impeach an adverse witness; (4) must be so material to the issues. . . that the verdict and judgment would have been different had the newly discovered evidence been introduced at the former trial; (5) that the defeated party had no opportunity to make the defense or was prevented from doing so by unavoidable accident, or the fraud or improper conduct of the other party, without fault on his part. Trimble v. Union Pacific Stages, 105 Utah 457, 142 P.2d 674 (1943); State v. Moore, 41 Utah 247, 126 P. 322 (1912); Klopenstein v. Hays, 20 Utah 45, 57 P. 712 (1899).

Contrary to these guidelines, appellant specifically states that the new evidence produced by the appellant was "evidence which tested the defendant's credulity." Appellant offers no showing that the evidence presented at the post trial motions was either new or that with reasonable diligence it could not have been discovered and presented at trial. Appellant must assert and prove those conditions as the bare minimums necessary to secure a new trial. Since appellant made no such claim to either the trial court or now on appeal, her appeal on this ground must fail.

Additionally, appellant entirely neglects to make the essential showings that there was no opportunity for her to make the evidence available at trial, and most critically that she was not at fault. In fact, all of the evidence that appellant alleges as being the basis for the new trial was in the exclusive control and purview of the appellant from the time this action was commenced. Appellant was requested to produce most of the items at the second hearing in Provo. However, she did not produce them, but claimed to have had them in a "box in the car." Appellant withheld these documents from the respondent when he

needed them, but when she thought they would help her point of view at a post-trial hearing, she was able to produce some, if not all of the documents. The trial court observed all of this, and must have considered the same in making its decision.

Granting a new trial based on newly discovered evidence is "highly discretionary" and "a matter wholly within the trial court's discretion." It is not an abuse of that discretion to deny a new trial where the trial court "reasonably could have determined that such evidence would not likely change the result or that the requirements of due diligence had not substantially been met." Fuller v. First Security Bank of Utah, 10 Utah 2nd 277, 348 P.2d 930 (1960). The trial court's decision in refusing to grant the appellant a new trial is conclusive unless there clearly appears to be an abuse of discretion. James Manufacturing Co. v. F.I. Wilson, 15 Utah 2nd 210, 390 P.2d 127 (1964). Review by the Supreme Court is only available on a question of abuse of discretion by the trial court. Crellin v. Thomas, 122 Utah 122, 247 P.2d 264 (1952); Greco v. Gertile, 88 Utah 255, 53 P.2d 1155 (1936). Appellant does not even raise the issue of the trial court's abuse of discretion when it denied the appellant a new trial. Respondent respectively submits that appellant has no grounds for a new trial based on new evidence inasmuch as appellant failed to show reasonable diligence by the appellant in obtaining evidence; unavailability of the evidence prior to trial; or, an abuse of discretion by the trial court. These failures are intensified by appellant's own exclusive control over the supposed new evidence and the fact that the



apparent sole purpose of the new evidence is an attempt to impeach respondent as a witness and to contradict existing evidence, all of which appears not to have a substantial bearing on the trial court's judgment. Appellant's request for a new trial must therefore fail.

#### POINT IV

THE COURT DID NOT ERROR IN DEBITING THE APPELLANT'S PRE-TRIAL ASSETS IN THE SUM OF \$10,000.00.

Again respondent must urge that by appealing the trial court's decision, appellant has the burden of proof to show that the evidence clearly preponderates against the decision. See McCrary, and Pearson, op. cit. This showing must be strong enough to overcome the presumption of validity attached to the trial courts decision. See Mitchell, op cit.

The appellant claims that the court committed error when it debited the appellant's pre-marital assets by \$10,000.00 which amount was paid to the appellant's daughter to supposedly purchase the daughter's alleged interest in the Woodshed business. The court concluded that money was a gift by the mother to the daughter rather than a payment and that the money came from the parties combined funds. Hence, the court debited the appellant's pre-marital assets for that amount (R. 135). The appellant's challenge to the court's conclusion must show that the evidence clearly preponderates against the trial court's decision. Any doubt as to the sufficiency of the evidence is to be construed in favor of respondent.

As evidence to support appellant's contention, the appellant offers a statement by the respondent (R. 314) and one by the appellant (R. 386) each to the effect that the \$10,000.00 payment was made on the pretense of a payment for purchase of the daughters interest in the Woodshed.

The transcript, however, contains testimony by the respondent that the daughters interest in the Woodshed was a gift as the daughter had made no cash investments in the business, and had only put in a few Saturdays working in the store while out visiting with her mother. Further, the supposed purchase of the daughter's interest was made without respondent's knowledge or permission. (R. 315). Appellant testified that the money was given to the daughter because she was moving and needed the money. (R. 366). Appellant was unable to provide proof that the \$10,000.00 was not a gift to her daughter (R. 281, lines 19-25).

The court heard the testimony, observed the demeanor of the parties and concluded from this evidence that the \$10,000.00 given by appellant to her daughter was a gift. Therefore, the court rightly debited appellant's pre-marital assets accordingly. Appellant cannot provide any evidence sufficient to rebut the trial court's conclusion. Since appellant's burden of proof has not been met, her request to further modify the decree should fail.

#### POINT V

RESPONDENT IS ENTITLED TO INTEREST ON HIS  
PORTION OF THE MARITAL ESTATE DURING THE  
PENDENCY OF THIS APPEAL

Respondent believes the decision of the trial court was and is a fair and equitable distribution of the marital assets of the parties. Due to this appeal, which respondent feels is without merit, respondent has been unable to secure his portion of the marital estate. In fact, during the pendency of the appeal, appellant has refused to participate in making two (2) annual installments on the "Bluebell property," and has withheld from the respondent two (2) payments on the "Independence property." Respondent requests that pursuant to 15-1-4, U.C.A., 1953 as amended, that he be awarded interest from the appellant on his share of the marital assets, at the rate of eight percent (8%) per annum, from and after appellant's filing of notice of appeal, until the property is sold. Respondent cites as additional authority for this proposition, the following: Keller v. Chournos, 95 U. 31, 79 P.2d 86; Dairy Distributors, Inc. v. Local Union 976 Joint Council 167, Western Conference of Teamsters, 16 U.(2d) 85, 396 P.2d, 47; and Woodmont, Inc. v. Daniels, 290 F.2d 186.

#### CONCLUSION

The decision of the trial court does not demonstrate an abuse of discretion in the division of the property, the determination of contributions and deductions of the parties to marital assets or in refusing to grant appellant a new trial. The decision of the trial court should be affirmed, and respondent should be awarded interest on his portion of the marital assets at the rate of eight percent (8%) per annum from

and after the date of appellant's filing her notice of appeal herein.

Respectfully submitted this 30<sup>th</sup> day of May, 1980.

MANGAN & GILLESPIE

George E. Mangan  
George E. Mangan

CERTIFICATE OF MAILING

I hereby certify that on the 30<sup>th</sup> day of May, 1980, I mailed a true copy of the foregoing Brief of Respondent, postage prepaid, to Richard B. Johnson, HOWARD, LEWIS & PETERSEN, P.O. Box 778, 120 East 300 North, Provo, Utah 84601.

Marie Bolton  
Secretary